Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq

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CONTENTS

I. Introduction .......................................................................................................................... 641
II. Why We Protect Cultural Property .................................................................................... 646
III. The Outbreak of the Current Armed Conflicts and the Fate of Cultural Property ................................................................................................................................. 655
   A. Syria .................................................................................................................................. 656
   B. Iraq ................................................................................................................................. 666
IV. The Legal Landscape in Context ......................................................................................... 670
   A. Obligations on the Parties to the Conflict ...................................................................... 671
   B. Consequences of a Failure to Comply with Obligations .............................................. 685
V. Concluding Comments ......................................................................................................... 695

I. INTRODUCTION

On June 24, 2014, a month after ISIS\(^1\) leader Abu Bakr al-Baghdadi declared the formation of an Islamic Caliphate stretching from northern Syria

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1. Islamic State in Iraq and Al-Sham (ISIS). The group is otherwise referred to as “Daesh” or “Islamic State of Iraq and the Levant” (ISIL).
Protecting Cultural Property in NIACs

into Iraq, ISIS militants, who had taken control of the city of Mosul in Iraq, methodically laid explosives in and around the famed shrine and mosque of the Prophet Younis and blew up the ancient site. The destruction, which reduced the shrine and Iraq’s oldest mosque to a mound of rubble, was captured on video and subsequently posted online. The shrine was built on an archeological site dating back to the eighth century BC and was renovated in the 1990s under Saddam Hussein. It was a popular destination for Muslim and Christian pilgrims from around the world. Although it was not the first time that ISIS had targeted religious and cultural property, the destruction of the shrine marked the beginning of a theatrical campaign by the militants to systematically annihilate such property in the territories under their control. The ensuing assaults on religious and cultural property—more visible in Iraq but which nevertheless also extended to Syria—sparked widespread condemnation and were described by UNESCO’s Director-General as “cultural cleansing” and as constituting war crimes. The release by ISIS of graphic images displaying the deliberate destruction of religious and cultural sites, buildings, monuments and ancient artefacts, may have placed the protection of cultural property center-stage. However, it has not gone unnoticed that, in the course of the recent wars that have blighted both countries, States and other non-State actors have likewise consistently failed, albeit in different ways and degrees, to fully respect cultural property as they are legally required to do.

The ambition to protect cultural property in war dates back to the latter half of the nineteenth century, when States first began to codify rules to

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4. UNESCO, Heritage and Cultural Diversity at Risk in Iraq and Syria, 3–4 (Dec. 3, 2014) [hereinafter UNESCO, Heritage], http://www.unesco.org/culture/pdf/iraq-syria/IraqSyriaReport-en.pdf (“The term cultural cleansing refers to an intentional strategy that seeks to destroy cultural diversity through the deliberate targeting of individuals identified on the basis of their cultural, ethnic or religious background, combined with deliberate attacks on their places of worship, memory and learning. The strategy of cultural cleansing that can be witnessed in Iraq and Syria is reflected in attacks against cultural heritage, that is both against physical, tangible and built expressions of culture such as monuments and buildings, as well as against minorities and intangible expressions of culture such as customs, traditions and beliefs.”).
limit the detrimental effects of warfare. Often, however, the law has not kept pace with societal expectations or the changing nature of warfare. In particular, the large scale destruction and misappropriation of cultural property during the Second World War exposed the need for a more robust protection regime and, in 1954, this lacuna was filled with the adoption of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Cultural Property Convention). In 1977, the protection of cultural property was given a further boost with the adoption of the Additional Protocols to the 1949 Geneva Conventions, codifying the


6. Some experts have suggested that the changing character of warfare has heightened the risk of destruction of and damage to cultural property. See, for example, a report released in February 2002 by the International Committee of the Red Cross (ICRC) stating the growing number of interreligious and interethnic conflicts has implied not only attacks against civilians but also, in many cases, the destruction of civilian objects, in particular cultural property. Acts of vandalism directed against such objects or their destruction are particularly common in such conflicts, as cultural property can be considered to symbolize the cultural identity and history of the adverse party.

INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, REPORT ON THE MEETING OF EXPERTS, OCT. 5–6, 2000, at 9 (2002) (Introduction). A similar sentiment was also expressed by UNESCO’s Director-General following the attacks by ISIS on Mosul Museum in February 2015 when she stated, “this tragedy is far from just a cultural issue: it’s an issue of major security. We see clearly how terrorists use the destruction of heritage in their strategy to destabilize and manipulate populations so that they can assure their own domination.” UNESCO Calls for Mobilization to Stop “Cultural Cleansing” in Iraq, UNESCO (Feb. 27, 2015), http://whc.unesco.org/en/news/1242/.

rules on the conduct of hostilities.\(^8\) However, much of this progress was confined to affording greater protection to cultural property in international armed conflict (IAC) or, in other words, inter-State conflict. In contrast, the protection of cultural property in non-international armed conflict (those waged between the armed forces of the State and organized armed groups or between such groups, or NIAC) lagged due to the reluctance on the part of States to allow for any international regulation of internal violence. The perception that international regulation would constitute a violation of State sovereignty and an interference in internal matters has meant that even when treaties have been extended to NIAC, as in the case of the Cultural Property Convention, the process has been carried out through a poorly drafted provision that has subsequently given rise to different interpretations and legal ambiguity.\(^9\) Further compounding this difficulty is the fact that often inadequate attention is paid to how the substantive provisions set forth in a treaty designed primarily for IAC apply in NIAC, in light of the fundamental differences between the two types of armed conflict.\(^10\) This has certainly been the experience with the Cultural Property Convention. Criticisms aside, the Convention must nevertheless be ap-

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\(^9\) Structurally, the 1954 Cultural Property Convention parallels the precedent established by Common Article 3 to the 1949 Geneva Conventions and extends, as a minimum, rules on “respect” (as set forth in Article 4) for cultural property in non-international armed conflict. 1954 Cultural Property Convention, supra note 7, art. 4. However, the wording of Article 19 of the Cultural Property Convention (on the material scope of the obligations) is unclear and consequently legal experts disagree as to which obligations apply in NIAC. Id. art. 19. For further commentary, see Sandesh Sivakumar, The Law of Non-International Armed Conflict 377 (2012). A similar criticism of the 1999 Second Protocol to the 1954 Cultural Property Convention has been made by other experts. See Jean-Marie Henckaerts, The Protection of Cultural Property in Non-International Armed Conflicts, in Protecting Cultural Property in Armed Conflict 81, 83–85 (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010). Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S 212 [hereinafter Second Protocol].

plauded on the basis that it is the first treaty which extends the application of conduct of hostility rules to NIAC.\footnote{11. Henckaerts, supra note 9, at 87–88.}

Over the following four decades, little headway was made in furthering the protection of cultural property in NIAC, despite the adoption of Additional Protocol II in 1977.\footnote{12. For comment on the legal effect of Additional Protocol II, see id.} This hiatus in the progress of legal protection was reversed in the aftermath of the Balkan wars of the early 1990s. While it was the scale of the human suffering which unfolded at Europe’s back-door that was the catalyst for the “revival” of international criminal law and a change in global attitude towards the international regulation of NIAC, the targeting of cultural property by all parties to the conflicts gave additional momentum for change. The systematic destruction of cultural heritage, exemplified by the attacks on the bridge at Mostar and the bombing of Dubrovnik’s old city center (a recognized World Heritage site), prompted States to take further steps in the protection of cultural property. The initiatives culminated in the adoption in 1999 of the Second Protocol to the 1954 Cultural Property Convention which applies in its entirety to both IAC and NIAC.\footnote{13. Jiří Toman, The Road to the 1999 Second Protocol in PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT, supra note 9, at 1, 10.} Thus, over the last two decades there have been significant advances in the evolution of the normative regime—treaty and customary international law—to protect cultural property in NIAC. As cultural property has once again come under attack it is pertinent to ask what rules apply to the parties in the existing conflicts in Syria and Iraq.

This paper is divided into four sections. In Section II we confront the “extra-legal” question as to why cultural property merits legal protection, not least in war. Addressing this question seems necessary because to concern ourselves with the protection of cultural property against the backdrop of the shocking level of carnage, loss of life and suffering endured by the people of Iraq and Syria begs the question as to whether our moral outrage and concerns over property destruction and damage are misplaced. The armed conflicts that have plagued both countries in recent years have exacted a heavy human toll. Combined, as many as three-quarters of a million have died as a direct and indirect consequence of the conflicts, while fifteen million have been displaced.\footnote{14. According to the Internal Displacement Monitoring Centre, the conflict in Syria has displaced over eleven million people (7.6 million are internally displaced) whilst in Iraq over four million people have been internally displaced. Internal Displacement Monitoring
figures that demand far more proactive efforts on the part of the global community to provide meaningful protection.\footnote{This should not be interpreted as a call for the use of force on humanitarian grounds. It is neither lawful nor, in the opinion of the authors, an option that will serve the needs of those who require protection.} But to care about protecting civilians from the effects of war should not deprive us from wanting to concurrently protect civilian property more generally and cultural property in particular. We therefore start from the simple premise that these are not mutually exclusive goals. As such, we do not explore the philosophical and moral questions that are engendered by the notion of hierarchies in the idea of protection.\footnote{The law generally confronts the question of these hierarchies through terms such as “reasonable” and “feasible.” Since the law of war embraces both utilitarian and deontological approaches, there are never absolute answers.} However, what we do engage with is the equally vexing set of questions pertaining to the interests that the law seeks to uphold through the protection of cultural property. In Section III we trace the destruction and damage to cultural property that has been documented in both Syria and Iraq over recent years. We do so not only to draw attention to the extent of the destruction but also to identify the different ways in which such property has been harmed to better account for any gaps in the existing law. In Section IV we critically examine the legal landscape pertaining to the protection of cultural property in NIAC and what consequences follow in the event of a breach of a prohibition. In Section V we offer some concluding comments.

II. Why We Protect Cultural Property

international concern and subject to international norms. That said, one of the most curious aspects of the international law on the protection of cultural property is that there is no consensus as to what constitutes such property. The definition of cultural property varies between international instruments and consequently what falls within the scope of protection under any single treaty will not necessarily do so under another.19 Take, for example, those treaties applicable in armed conflict. Under the Cultural Property Convention, protection is limited to “movable or immovable property of great importance to the cultural heritage of every people,”20 while the 1907 Hague Regulations extend protection, without condition, to “buildings dedicated to religion, art, science, or charitable purposes [and] historic monuments.”21 A further layer of complexity and definitional inde-

19. See, e.g., Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention], which defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.” The definition in the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, is described as more “elastic” in that cultural objects are “those which, on religious or secular grounds, are of importance for archaeology, prehistory, literature, art or science.” See also JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 40–41 (1996).

20. The 1954 Cultural Property Convention defines cultural property as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and repositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centers containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as ‘centers containing monuments.’

1954 Cultural Property Convention, supra note 7, art. 1(a).

21. Hague Regulations, supra note 5, art. 27. Yet another definition is introduced in AP II, supra note 8, art. 16, which refers to “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples,” although experts have emphasized that despite the difference in terminology between the 1954 Cultural Property Convention and AP II, “the basic idea is the same.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2064 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987)
terminacy is presented by customary international law definitions that do not correspond to treaty definitions. Adding to the indeterminacy of what constitutes cultural property is the fact that the decision as to what property merits protection because it is labeled “cultural property” is a matter left for individual States to determine.

The literature on cultural property is equally multi-textured and, for the most part, the discourse is dominated by an overriding ambiguity that oscillates between over- and under-inclusive ideas as to what comprises cultural property. Legal experts continue to struggle to define the term, if only to pinpoint precisely what is implicated, but even when approached disjunctively, both the concept of “property” and of “culture” elude categorical or normative definition. The most we can conclude is that cultural property is more than just “property”—moveable or immovable, tangible or intangible—but an ever-shifting dynamic idea that alters with time and location. That no real consensus exists as to what constitutes cultural property is unsurprising since, by definition, the very term defies definition. If clarity and precision are essential to the question of protection, we are further thwarted by the constant slippage in the lexicon, intended and otherwise. As the law maneuvers between cultural “property,” cultural


22. That said, in the context of the law of armed conflict and for the purposes of international criminal law, the accepted customary international law definition is that which is set forth in the 1907 Hague Regulations.

23. Claudia Caruthers, International Cultural Property: Another Tragedy of the Commons, 7(1) PACIFIC RIM LAW & POLICY JOURNAL 143, 147 (1998). As Caruthers observes, “the morphology of traditional Western property theory reflects very abstract notions of property. Thus we find Lockean labor concepts, intellectual property notions regarding the creation of value, prime possessor norms and utilitarian concepts all competing, among others, for hegemony. Property eludes categorical or normative definition.” Critical scholars have also exposed how prevailing conceptions of temporality which are essentially chronological and linear rather than “ethical-centripetal” have shaped the definitions of what constitute cultural property in international legal instruments. Reinhard Bernbeck, Heritage Politics: Learning from Mullah Omari, in CONTROLLING THE PAST, OWNING THE FUTURE: THE POLITICAL USES OF ARCHAEOLOGY IN THE MIDDLE EAST 27–54 (Ran Boytner, Lynn Swartz Dodd & Bradley J. Parker, eds., 2010). For a useful insight, see Tatiana Flessas, Cultural Property Defined, and Redefined as Nietzschean Aphorism, 24 CARDOZO LAW REVIEW 1067 (2003).

“patrimony” and cultural “heritage,” towards property of “great importance” to property that is of “universal” value, and from property that is of value to “peoples,” to “mankind,” to “States,” we are left no wiser. These ambiguities and tensions are embedded and reproduced in the law of armed conflict (LOAC) exemplified by the 1954 Cultural Property Convention. While the Preamble embraces an internationalist calling in announcing that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world,” the treaty text sets forth a definition of cultural property that necessarily defers to the judgment of States.

The law leads us full circle, back to the same questions: What qualifies for protection? Who decides what is “ordinary” versus of “great importance” and on what basis? These questions entail subjective judgments based on arbitrary criteria.

We suggest that the elusiveness of what comprises cultural property rests with the fact that law is attempting to protect a multiplicity of interests and values represented by “cultural property” that are constantly in flux. Definitions will always be under- or over-inclusive because the value that is projected onto the form of the property—whether it is aesthetic, symbolic, institutional, instrumental, monetary, knowledge or a combination thereof—is perpetually being constituted, contested and re-


27. In the words of O’Keefe, “what all this means in practice is that Article 1 devolves to each party the discretionary competence to determine the precise property in its territory to which the Convention applies.” ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 105 (2006).

28. But, as O’Keefe points out, “things are not so straightforward.” O’Keefe, Protection, supra note 21, at 433, ¶ 9. If a State fails to identify what property it considers to be “of great importance to the cultural heritage of every people,” judgment necessarily falls to others to decide. However, to suggest—as is done in the OFFICE OF THE GENERAL COUNSEL, US DEPARTMENT OF DEFENCE, LAW OF WAR MANUAL ¶ 5.18.1.2 (2015) [hereinafter DoD LAW OF WAR MANUAL]—that “ordinary property (such as churches or works of art) that are not of great importance to the cultural heritage of every people would not qualify as cultural property” is potentially problematic and the better approach is to err on the side of caution.
constituted. What elevates some civilian property to merit “special” protection is simply the additional value, whatever that might be, that has been projected onto the property.\(^{29}\) Thus, in thinking about why we protect cultural property, the more useful avenue of interrogation may be to ask what values are being upheld by the law through the protection of such property.

Calls to accord cultural property special protection have often been founded on the perceived aesthetic value of the property. One of the earliest proponents of this view is Emer de Vattel who reasoned:

> [F]or whatever cause a country be devastated, these buildings should be spared which are an honour to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings and all edifices of remarkable beauty. What is gained by destroying them? It is the act of a declared enemy of the human race thus wantonly to deprive men of these monuments of arts and models of architecture . . .\(^{30}\)

It was along the same vein that in 1944 Sir Harold Nicholson penned his now well-cited pleading for special protection of works of “major artistic value.”\(^{31}\) The sentiment expressed is not dissimilar to that more recently voiced by Stanislaw E. Nahilik:

> The human individual is mortal and generations follow one upon the other. It is nevertheless possible for every generation, however fleeting its existence, to leave here below an immortal trace of its genius, embodied in a

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29. The law of armed conflict confronts the problem of contingency by extending protection, at a minimum, to all such property by virtue of it being civilian.


31. Sir Nicolson argued, it is to my mind absolutely desirable that works [of major artistic value] should be preserved from destruction, even if their preservation entails the sacrifice of human lives. I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant (were such a decision ever open to me) to save St. Mark’s even if I were aware that by so doing I should bring death to my sons. I should know that in a hundred years from now it would matter not at all if I or my children had survived: whereas it would matter seriously and permanently if the Piazza at Venice had been reduced to dust and ashes either by the Americans or ourselves. My attitude would be governed by a principle which is surely incontrovertible. The irrereplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again.

work of art here, an historical monument there or cultural property in another case. We should never forget the relationship between what is fleeting and what, alone, can endow people and their works with perennial qualities. Vita brevis—Ars longa . . . 32

Two comments are merited. First, the idea that an object by virtue of its aesthetic value alone merits protection in war is a view that can be traced to the end of Renaissance and the emergence of a European “elite” with cosmopolitan tastes and interest in fine arts, architecture and antiquities. 33 Prior to this period, and certainly well into the seventeenth century, there is little evidence to indicate that such objects merited any kind of protection, least of all in war. 34 The destruction of property was accepted as an inevitable aspect of warfare and, if enemy property was spared, it was, more likely than not, on the basis that the spoils of war belonged to the victor. 35


33. The emergence of a ruling class who began to take an interest in classical antiquity can be traced to the Renaissance. This trend took on greater momentum throughout the Enlightenment and, with the advent of disciplines including archeology, history and art, the idea of collating material not only for those ends, but also to study and order, was embraced and exemplified by the arrival of the museum and the gallery. This period of European colonization also witnessed the discovery of major archaeological sites including, for example, Pompeii.

34. As Sax notes, “for most of history, neglect or iconoclasm were far more common than protection,” Joseph L. Sax, Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea, 88 MICHIGAN LAW REVIEW 1142, 1143 (1990). PATRICK J. BOYLAN, UNESCO REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, ch. 2, sec. 4 (1993) [hereinafter BOYLAN REPORT] (concluding that “the destruction, defacing or conversion to a deliberately inappropriate use of monuments of special cultural value to the identity and spiritual values of a conquered people—such as religious buildings and national historic sites—has been widely used throughout history as a sign of conquest and subjugation.”).

35. The Greek historian Xenophon noted, “it is a universal and eternal law that, in a city captured by enemies in a state of war, everything, both persons and goods, shall belong to the conquerors.” XENOPHON, CYROPAEDIA book 7, ch. 7, § 73, http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0204%3Abook%3D7%3Achapter%3D5%3Asection%3D73. Some scholars have suggested that sacred objects were spared by the Romans out of respect, but there is little evidence to show that such practices represented the norm. See generally Margaret Miles, Burnt Temples in the Landscape of the Past in Valuing the Past, in THE GRECO-ROMAN WORLD: PROCEEDINGS FROM THE PENN-LEIDEN COLLOQUIA ON ANCIENT VALUES VII 111–45 (Christopher Pieper & Janes Ker eds., 2014); MARGARET MILES, ART AS PLUNDER: ORIGINS OF DE-
ond, those who invoke the aesthetic value of an object as the basis for protection generally cite a supplementary value in support of their claim;\textsuperscript{36} this is to be expected given the problematization of aestheticism.

In a great majority of cases, the special protection that is accorded to cultural property derives from its symbolic value. This is because such property is often an expression or representation of a shared social identity.\textsuperscript{37} As UNESCO’s Director-General noted, “culture and heritage are not about stones and buildings—they are about identities and belongings. They carry values from the past that are important for the societies today and tomorrow. . . . We must safeguard the heritage because it is what brings us together as a community; it is what binds us within a shared destiny.”\textsuperscript{38}

\textsuperscript{36}For example, Nahilik’s reasoning is based not solely on the aesthetic value of the property but also on the possibility that “man” might defy his own mortality through the creation of an object that has the potential to exist in perpetuity. Nahilik, supra note 32.

\textsuperscript{37}As was acknowledged in the BOYLAN REPORT, supra note 34, ch. 13.13, “the very concept of culture is far from absolute but is very much a product of the culture and values of those making the various self-definitions.” It is well-established that cultural property is not only constituted by, but also functions to constitute identities. States have been particularly resourceful in instrumentalizing cultural property to define identities for political ends. The power of cultural property to serve both as a unifying and divisive force was fully appreciated, paradoxically, by the now-extant Baath Party which, from its rise in 1968, pursued policies designed to engender a collective identity around the secular State. See Benjamin Isakhan, Targeting the Symbolic Dimension of Baathist Iraq: Cultural Destruction, Historical Memory, and National Identity, 4 MIDDLE EAST JOURNAL OF CULTURE AND COMMUNICATION 257–81 (2011).

\textsuperscript{38}Irina Bokova, Address at the International Council on Monuments and Sites (ICOMOS) Gala to commemorate the 40th Anniversary of the World Heritage Convention (Dec. 2, 2012).
paradox is that the very value that makes such property merit special protection is often the basis upon which the property is specifically targeted in war. Attacking cultural property because it is affiliated with the identity of the adversary remains a far too frequent feature of war, including the current conflicts in Syria and Iraq. The symbolic value of cultural property as a testament to human plurality, to human diversity and of the possibility of coexistence among different groups is also deeply entrenched in contemporary concerns over protecting cultural property. Objects and physical remains of the past, which were once collected simply out of curiosity for the past, have acquired an additional symbolic dimension as the tangible manifestations of pluralism and of human diversity, which are regarded today as good ends in their own right. This is what was intimated by the UN Secretary-General’s Special Envoy when, bemoaning the destruction in Aleppo, he described it as “a particularly valuable city in terms of cultural heritage and diversity, where all religions co-exist, where all cultures of the Mediterranean have left their mark.”

In addition to its symbolic and aesthetic value, the intrinsic value of cultural property as a vessel of knowledge is widely acknowledged. As a source of knowledge, cultural property provides a richer insight into human existence across time and space. Importantly, because such knowledge is not only intrinsic to the form, but also derives from the context within which that object originates, the severing of the object from its context fundamentally deprives the object of its full knowledge value, demonstrated by the protection accorded to archeological sites rather than solely to the objects contained therein. The legal protection of such sites reinforces the value that contemporary society places on knowledge acquisition—known and yet to be discovered—as a common aspiration.

The law’s concern with protecting cultural property is based not on a single defining value but on a collection of values that are projected onto...

39. UNESCO, Background Note to the International Conference “Heritage and Cultural Diversity at Risk in Iraq and Syria,” The Protection of Heritage and Cultural Diversity: A Humanitarian and Security Imperative in the Conflicts of the 21st Century 3 (Dec. 3, 2014), http://en.unesco.org/system/files/iraqsyriaeventbackgroundnoteeng.pdf (“Attacks against heritage and cultural diversity have become a recurrent phenomenon in a number of recent armed conflicts. Such attacks, combined with the persecution of minorities, as witnessed both in Iraq and Syria, represent a form of cultural cleansing that seeks to destroy the legitimacy of the “other” to exist as such.”).

40. BRUCE TRIGGER, A HISTORY OF ARCHAEOLOGICAL THOUGHT 27 (2d ed. 2006).

41. UNESCO, Heritage, supra note 4, at 7 (statement by Mr. Staffan de Mistura, UN Special Envoy of the Secretary General for Syria).
and embedded in the form of the property. Thus with every property that is damaged and destroyed in the current conflicts, what is lost is far more than the object itself. The cultural wealth of both Syria and Iraq are well-documented but it is worth recalling what is at stake.\textsuperscript{42} The territories which comprise modern-day Iraq and northeast Syria correspond to a geographical area which, over six thousand years ago, formed Mesopotamia, “the cradle of civilization,” and it was only in the last century that foreign and local archeologists working in both countries begun to uncover the histories of Mesopotamia’s civilizations.\textsuperscript{43} These excavations soon revealed a fertile landscape that was once dominated by the Sumerians, Babylonians and Assyrians.\textsuperscript{44} Each civilization left behind traces—some now visible and a great deal still hidden—of their extraordinarily sophisticated societies. Across Iraq and Syria, the landscape is littered with ancient sites and structures, some dating back to this early period and still others to later periods evidenced by the influence of Hellenistic and Roman architecture. Ancient cities such as Aleppo and Damascus, which lay at the crossroads of major trade routes linking East with West, brim with tangible traces of past civilizations dating back to the second and third centuries respectively. Across both Syria and Iraq, the plurality of human histories is chronicled in the archaeological sites, the museums and in the towns and cities, some of which are now inscribed on UNESCO’s World Heritage List and Tentative List. Over the centuries the wars fought on this territory would have resulted in the loss of a considerable inventory of human creativity and, with every war fought, less of the past—whether as knowledge or as a testament to human diversity—remains to be handed down to future generations.

\textsuperscript{42} In 2011 only sixteen foreign teams and twenty-five national teams out of the pre-conflict 138 archaeological missions in Syria were still operating.

\textsuperscript{43} What archeologists began to discover forced many to fundamentally reappraise their views given the unexpectedly sophisticated level of development that had been attained by these civilizations. The excavations revealed, among other things, evidence of when man first tamed nature through complex irrigation systems to facilitate agricultural development; of the domestication of animals; of the first cities to have been built; and of the establishment of trade routes. Over the years further discoveries were made and evidence emerged of the oldest form of writing; of the “birth” of mathematics and with it the idea of measuring time; of the concept of legal obligations and rights; and that art, architecture and culture had thrived.

\textsuperscript{44} Little was known of the Babylonians, Assyrians and Sumerians until archeologists began to excavate in the early twentieth century. Unlike the Egyptians, the peoples of Mesopotamia had built using mud bricks and, over the centuries, rain, flooding and shifting sand levels had levelled the bricks and buried towers and palaces, leaving shapeless mounds.
The damaging effect of recent conflicts on the cultural heritage of Syria and Iraq is impossible to quantify. From the Iran-Iraq war, to the Gulf wars and the current conflicts originating in the 2010 Arab revolutions, the cultural heritage of both Syria and Iraq has been destroyed and damaged as a direct and indirect consequence of war.

III. The Outbreak of the Current Armed Conflicts and the Fate of Cultural Property

During the early months of the armed conflict in Syria international attention was focused almost exclusively on the human dimension of the tragedy. But as the war spread and continued unabated, attention began to shift to other aspects of the conflict, including the extent to which Syria’s cultural heritage was being systematically damaged and destroyed, sometimes deliberately, but often as a result of the armed clashes between the different parties. The breakdown in law and order as a consequence of the war was also giving rise to a different type of threat to cultural property: namely, an escalation in the level of illegal excavations and lootings of archeological sites and museums, which were being fueled by the illicit trade in antiquities.45

As with Syria, when armed conflict once again broke out in Iraq in January 2014, international attention was first and foremost directed at the humanitarian disaster that was swiftly unfolding across the country. Although ISIS had been conducting military operations in Iraq since the autumn of 2013, the growing civil unrest in Iraq presented the group with an opportunity to exploit the internal divisions and, by year-end, ISIS had extended its operations into Anbar governorate, adjacent to the border with Syria.46 Following heavy clashes with the Iraqi Security Forces (ISF), ISIS

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45. As a consequence of war all major restoration and preservation projects have been suspended causing further damage. What is more, a considerable number of ancient sites are now being used by those who have been displaced by the conflict.

46. The civil unrest had been ongoing since the end of 2012 due largely to the exclusion of the Sunni community by the Shia-dominated Government in Baghdad. Although ISIS militants were already operating in Iraq (for example in Erbil, Kurdistan) in September 2013, they were only one among a handful of extremist groups conducting military operations. S.C. Res. 261, ¶ 55 (Nov. 13, 2013). Throughout 2013, ISIS (in one shape or form) had been increasing its geographical scope of operations and by the end of 2013 it had managed to assert control over parts of Anbar governorate, adjacent to the border with Syria. See also U.N. Assistance Mission for Iraq Human Rights Office & U.N. Office of the High Commissioner for Human Rights, Report on the Protection of Civilians in the Non-
eventually took control of Ramadi and Fallujah in January 2014, marking the beginning of its expansion and control of territory across Iraq and Syria. The very fact that ISIS has been able to consolidate control over vast swathes of territory extending from Syria into Iraq has added a new dimension to the threat to cultural property in both countries. This is because in the territories over which they have control, the militants have been able to wage a campaign to deliberately destroy the cultural heritage located therein and concurrently to expedite the unlawful excavation of archeological sites, which, according to some accounts, has provided them with a lucrative source of income.

A. Syria

The armed conflict in Syria, which is now into its fifth year, has resulted in extensive damage to and destruction of Syria’s cultural heritage, including damage to all six World Heritage Sites and to eleven of the sites on the Tentative List. In June 2013, the World Heritage Committee took the ex-
exceptional decision to place all six sites on the World Heritage in Danger list.  

Of all six World Heritage Sites, Aleppo is the most badly damaged as the city has been a battleground between government forces and armed opposition fighters since September 2012. The ancient city of Aleppo, which dates back to the second millennium BC, earned its status as a World Heritage Site for its rare and authentic medieval Arab architectural styles enriched by the diverse cultural imprints of the successive empires—Byzantine, Roman, Greek and Ottoman—which once ruled over the city. One of the first serious losses was of the mediaeval souqs (markets), which were destroyed by fire amidst the fighting between the opposing parties. In 2013, the prized eighth century Great Mosque located in Aleppo’s walled Old City was seriously damaged and its famed eleventh century Minaret completely destroyed by shellfire as government forces sought to repel rebel fighters who had taken control of the site. The fighting in Aleppo intensified during 2014 when government forces clashed with both opposition fighters and extremist groups, each vying for control over the city. Damage to religious and cultural property across the city has been significant due to air strikes, barrel bombings, targeted explosions, fire and


heavy combat. Both the Museum of Popular Traditions and National Museum of Aleppo were looted; and the Waquifiyya Library was set on fire and its entire collection burned. In January 2015 the Armenian Cathedral in Aleppo was damaged in a targeted operation by ISIS. In particular, the use of tunnel bombs, a method of warfare that has become synonymous with ISIS, has resulted in considerable damage and destruction to historic structures and religious buildings. In July 2015, a tunnel bomb caused the collapse of part of the wall of the twelfth century Citadel of Aleppo; the citadel, which towers above Aleppo, has been used as a military base by government forces since August 2012.

Since early 2012, there have been armed clashes between Government and opposition forces in and around the ruins of Palmyra. Palmyra was inscribed on the World Heritage List in 1980 and was also designated a national monument by the Syrian government pursuant to the domestic An-


tiquities Law. The site, described as “an oasis in the Syrian desert,” contains the monumental ruins of a great city dating back to the first century; it was one the most important cultural centers of the ancient world and its architecture fuses Graeco-Roman techniques with local traditions and Persian influences. In February 2012, military units of the Syrian army were deployed to Palmyra to establish a base within the old city. Significant changes in the structure of the archaeological site and its surroundings were carried out (including, for example, digging trenches and building roads and levees) to enable the army to secure greater strategic control over the area and to allow for heavy arms (tanks, rocket launchers and armored vehicles and other military equipment) to be deployed on the site. Armed clashes between government forces and opposition fighters during 2013 and 2014 resulted in some damage to the ruins but it was the illegal excavations in and around Palmyra during this period that were equally, if not more, damaging. In mid-May 2015, Palmyra became the setting of a major clash between government forces and ISIS militants. It is difficult to know

59. Id.
60. Palmyra is located 134 miles from Damascus and surrounded by gas and oil fields, which supply the government’s western strongholds with much of their electricity. There is also a large airbase nearby.
63. According to the Directorate General of Antiquities and Museums, between 2012 and May 2015, 125 archaeological items from Palmyra were confiscated by authorities in Syria, Italy and Lebanon. As experts have observed, “these figures provide some indication of the large quantity of archaeological objects that have been looted from Palmyra, many stolen from tombs and sectors that have not yet been excavated by archaeologists. The total number of archaeological items looted from Palmyra, however, remains unknown.” Cheikhmous Ali, Palmyra: Heritage Adrift, THE ASSOCIATION FOR THE PROTECTION OF SYRIAN ARCHAEOLOGY 50 (2015), http://apsa2011.com/apsanew/palmyra-heritage-adrift/. See also MICHAEL D. DANTI, SCOTT BRANTING, CHEIKHMOUS ALI, TATE PAULETTE, ALLISON CUNEO, CATHY FRANKLIN & DAVID ELITZER, ASOR CULTURAL HERITAGE INITIATIVES: PLANNING FOR SAFEGUARDING HERITAGE SITES IN SYRIA AND IRAQ, WEEKLY REPORT 34—MARCH 30, 2014, at 43 (2014), http://www.asor-syrian-heritage.org/syrian-heritage-initiative-weekly-report-34-march-30-2015/.
how much damage was inflicted on the ancient ruins during the five days of fierce fighting.\textsuperscript{64} Prior to retreating, the Syrian authorities mounted an operation to transfer all movable cultural objects and artifacts to Damascus. In mid-June it was reported that ISIS had positioned explosives inside the temples and monuments. In late June local communities verified that ISIS militants had destroyed the first century BC lion-shaped Al-Lat statue at the entrance to the Museum of Palmyra.\textsuperscript{65} In early July, ISIS released images of their supporters in the act of destroying a number of funerary busts with sledgehammers.\textsuperscript{66} On August 25, ISIS released further images of the destruction of the Temple of Baalshamin, which was one of the more significant and best preserved buildings in Palmyra.\textsuperscript{67} On September 1, the UN released satellite images confirming the complete destruction of the Temple of Bel, which was considered by many to be the most important structure within Palmyra.\textsuperscript{68}

The Crac des Chevaliers, also a World Heritage Site, has been the scene of repeated fighting between government forces and opposition groups since June 2012. The fortress was built by the Hospitaller Order of Saint John of Jerusalem in the eleventh century and is one of the best preserved Crusader-era castles in the world. It commands a view of the surrounding region and overlooks the only corridor from Syria’s interior to the coast, as well as the entrance to Lebanon’s Bekaa valley. Early in the conflict, parts of the edifice were damaged by shelling in an attack by the army on opposi-

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\item[64.] ISIS took control of Palmyra on May 20, 2015.
\item[66.] Site of Palmyra (inscribed in 1980), supra note 65.
\item[68.] Palmyra’s Temple of Bel Destroyed, Says UN, BBC (Sept. 1, 2015), http://www.bbc.co.uk/news/world-middle-east-34111092.
\end{itemize}
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tion fighters who had taken refuge there. In March 2014 government forces reasserted control over the fortress after heavy aerial bombing operations. The extent of the damage caused as a result of this latest round of fighting is difficult to assess.

The ancient town of Bosra, another of Syria’s World Heritage sites, has long been a stronghold for government forces. The area is a major archaeological site containing ruins from the Roman, Byzantine and Islamic eras. The city houses a second century Roman amphitheater, the Nymph Temple, the Saint-Serge cathedral, the Al Omari Mosque, one of the oldest surviving mosques in Islamic history, the al-Fatemi mosque and the mosque of Mabrak el Naq’a. In 2014, armed clashes between government and opposition forces resulted in damage to all three mosques, the temple and the cathedral. In March 2015, government forces retreated from Bosra following sustained and heavy fighting with opposition forces. Considerable damage has been documented at Bosra caused by aerial bombardments, shellfire and gunfire.

Although it has been the damage to Syria’s World Heritage Sites that has captured global attention, religious and cultural property across the country has suffered a similar fate. In particular, citadels and mediaeval castles that dot the country and which rise high above surrounding towns

72. 2014 DGAM Report, supra note 54.
and cities have been the battleground for opposing forces fighting for control. For example, over the last four years, Homs Citadel and the medieval al-Madiq citadel in Hama Province have changed hands on numerous occasions and, in that process, both have been damaged by shellfire. As ISIS and other extremist groups expanded their territorial holdings in northern Syria from mid-2014 onwards, they set about deliberately destroying shrines, tombs, churches, mosques and other monuments including, for example, two eighth century Assyrian stone lions in Raqqa.

Aside from damage caused as a direct consequence of war, the conflict has given rise to an increase in illegal excavations and lootings made possible by the complete breakdown in law and order.

Aside from damage caused as a direct consequence of war, the conflict has given rise to an increase in illegal excavations and lootings made possible by the complete breakdown in law and order. As the UN Secretary-General noted in early 2014, “archaeological sites are being systematically looted and the illicit trafficking of cultural objects has reached unprecedented levels.”

Illegal excavations were not uncommon during the early years of the conflict, but by 2013 they had become large scale operations with the use of hundreds of diggers and heavy machinery, particularly in territory under ISIS control.

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excavations have been documented in the Valley of the Tombs and Camp Diocletian, as well as looting of several stone sculptures from unexcavated tombs. The ancient villages of Northern Syria, another of Syria’s World Heritage Sites, have also been damaged due to illegal excavations in several locations within the site, with pits “spread all over the place.” According to Syria’s Directorate-General of Antiquities and Museums (DGAM), the pattern of the excavations suggests that the digs were being carried out with a degree of expert knowledge. Four sites on Syria’s Tentative World Heritage List have been particularly hard hit: Mari, Dura Europos, Apamea and Ebla.

Mari (Tell Hariri) is an ancient Mesopotamian city located close to the border with Iraq and dates back to 2900 BC. It is a rich archeological site exemplified by the discovery of an archive containing fifty thousand clay tablets, which “provided a window into the first great urban civilization.” Conservation efforts were suspended with the outbreak of the war. The looting at the site has worsened over time and, by early 2014, illegal excavations were reportedly being carried out by “an armed gang.” In June 2014, Mari and the surrounding territory fell under ISIS control. Satellite imagery

81. The Valley of the Tombs contains large scale funerary monuments displaying distinctive decoration and constructive methods. Site of Palmyra, supra note 59.
82. Camp Diocletian was a Roman military complex built in the ancient city of Palmyra in the late third century.
85. 2014 DGAM Report, supra note 54, at 17. In Banasra, deep excavation pits have caused damage to structures such as the southern church, triggering the collapse of stone columns and the destruction of a large sarcophagus. Id. at 16.
of the site evidences a significant increase in the number of excavations between March–November 2014.\footnote{88} Dura Europos is a 140 acre archeological site located in Deir Ez-Zor Governorate. The site was founded by the Seleucids in the third century BC and contains remains that date back to the Hellenistic, Parthian and Roman periods.\footnote{89} Looting has historically been a problem at Dura Europos but the problem escalated dramatically in 2013. Reports that hundreds of people were involved in intensive excavation operations using heavy machinery have since been substantiated by satellite imagery, which reveals illegal excavations on an unprecedented scale.\footnote{90} At least 76 percent of the ancient Roman walled city has been damaged, with analysts concluding that “the disruption was so extensive that counting of individual looting pits was impractical; the pits overlap so that it is impossible to distinguish one unique pit from another.”\footnote{91} Beyond the walled city, the density of the excavations is lower but damage has nevertheless been severe. The site has been controlled by ISIS since 2014 following a series of clashes between the group and the Free Syrian Army and the Al Nusra Front.

Apamea is an archeological site that lies between Aleppo and Homs. It was founded in 301 BC and was one of the most important cities of the Seleucid era. The 2013 DGAM annual report concluded that, insofar as unlawful excavations are concerned, Apamea is one of the most badly affected sites in the country.\footnote{92} There have been reports of armed gangs carrying out systematic excavations using bulldozers and electric machines. Excavation pits—some up to twenty meters in depth—have been documented throughout the site and, in particular, around the temples, churches and baths.\footnote{93} In February 2014, UNESCO’s Assistant Director-General for Cul-

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\footnote{88}{AAAS Report, \textit{infra} note 86, pt. 1, at 20. Looting that occurred between August 2011 and March 2014 resulted in 165 visible pits over 965 days, whereas activity between March 25, 2014 and November 11, 2014 yielded approximately 1,286 pits over 232 days.}


\footnote{90}{2014 DGAM Report, \textit{infra} note 54, at 16; Cockburn, \textit{infra} note 3. For satellite imagery analysis see AAAS Report, \textit{infra} note 86, pt. 1, at 6.}

\footnote{91}{AAAS Report, \textit{infra} note 86, pt. 1, at 6.}

\footnote{92}{This assessment is corroborated by satellite imagery taken of the site in July 2011 and in April 2012. Looting at Apamea Recorded via Google Earth, \url{http://traffickingculture.org/data/data-google-earth/looting-at-apamea-recorded-via-google-earth/} (last visited Sept. 22, 2015).}

\footnote{93}{See, for example, UNESCO’s assessment of the impact of illegal excavation in Apamea. \textit{Apamea (Apamia)}, UNESCO, \url{http://www.unesco.org/new/en/safeguarding-}
ture described Apamea as “completely destroyed” by “thousands and thousands of illegal diggings.”

Ebla is located in Idlib province fifty-five kilometers southwest of Aleppo. Within the archeological site are a number of royal palaces, temples, monuments and burial grounds; the discovery of several thousand cuneiform tablets dating between 2500 and 2300 BC “revolutionized knowledge regarding the ancient history and political economy of the region.” Work at Ebla was suspended with the outbreak of the conflict and, during the early years, it was the setting of a series of armed clashes between government and opposition fighters. Looting at Ebla was initially small scale but, over time, the scale of illegal excavations appears to have increased significantly.

Syria’s museums, particularly in the northwestern region of the country, have been systematically looted throughout the duration of the conflict. Although at the start of the conflict the majority of artifacts from the thirty-four national museums were transferred to other more secure locations, the losses have been significant. For example, at Raqqa Museum, important archeological objects from the museum’s warehouse were stolen along with a number of ceramic objects from an exhibition hall in the historic Citadel of Jaabar. The Museum of Hama witnessed the theft of archeological artifacts including a gilt bronze statue dating back to the Aramean era. In the city of Marrat, the local museum was stormed by “an armed group” which stole thirty pieces of art. The Museum of Folklore in Aleppo was also looted with the loss of historical pieces including glassware, Baghdadi

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95. AAAS Report, supra note 86, pt. 1, at 10.


100. Looting of Museums and Warehouses in Syria, supra note 98.
daggers and spears.\textsuperscript{101} It is feared that many of these artifacts have been, or will be, trafficked out of Syria to the international antiquities market.\textsuperscript{102}

As of September 2015, figures released by the Syrian Directorate-General of Antiquities & Museums indicate that the total number of protected buildings and sites destroyed or damaged since the beginning of the conflict exceeds 750.\textsuperscript{103}

\textbf{B. Iraq}

The armed conflict in Iraq (which has been ongoing since March 2014) has resulted in a considerable level of destruction to the country’s cultural heritage. Of the four properties inscribed on the World Heritage List, three sites—Ashur, Samarra and Hatra—are on the List of World Heritage in Danger.\textsuperscript{104} Hatra is located within the territory controlled by ISIS. At least three out of the eleven properties currently on the World Heritage Tentative List have also been damaged.\textsuperscript{105} All three sites are also located within territory controlled by ISIS. In March 2015, nearly 1,800 of the country’s 12,000 registered archaeological sites were located in territory under ISIS control.\textsuperscript{106}

In June 2014 following a major clash between ISIS and ISF, the city of Mosul fell under ISIS control resulting in a mass exodus of half a million of its inhabitants.\textsuperscript{107} Although Mosul is neither on the World Heritage List nor

\textsuperscript{101}. Id.
the Tentative List, the level of destruction to the city’s religious and cultural property merits comment if only because it is emblematic of the type of deliberate destruction that is being wreaked by ISIS on cultural property located in the territories that it continues to control. In addition to the destruction of the shrine and mosque of the Prophet Younis (mentioned above) the militants also used explosives to destroy the fourteenth century shrine and mosque of the Prophet Jirjis, the mosque of the Prophet Sheeth, the tomb of Daniel and Hamou Qado Mosque. Mosul Museum was looted and the city’s Central Library ransacked resulting in the destruction of a hundred thousand books and rare manuscripts, some dating back to the Ottoman period. On February 26, 2015, ISIS released videos of its fighters in the act of systematically and deliberately destroying Assyrian sculptures at the Mosul Museum, as well as at the archaeological site of Nineveh. The ancient city of Nineveh, one of Iraq’s eleven properties on the Tentative List of World Heritage Sites, is located just outside Mosul on the bank of the River Tigris. The site dates back to the eighth century BC, when Nineveh was one of the three capitals of the Neo-Assyrian Empire.


The famous human-headed winged bulls guarding the entrance to Nineveh were destroyed by ISIS with heavy machinery and power tools.\textsuperscript{113} At around the same time that it took control of Mosul, ISIS also overran the ancient site of Hatra located seventy miles southwest of Mosul. Hatra had earned its status as a World Heritage site in 1985, with UNESCO citing the fusion of Hellenistic, Roman and Eastern architecture as a testament to “the greatness of its civilization.”\textsuperscript{114} Although it was originally a small Assyrian settlement, by the third century it had grown to a fortress city and the capital of the first Arab Kingdom.\textsuperscript{115} The site provides an insight into the Assyro-Babylonian civilization and, at the heart of the ancient city, there is a holy precinct enclosing a multitude of temples to the Hatrene Gods.\textsuperscript{116} On April 5, 2015 ISIS released further videos of its fighters deliberately destroying stone statuary and decorative architectural elements on the walls of the ruin with sledgehammers, pickaxes and rifles.\textsuperscript{117} The extent of the damage at Hatra is difficult to assess; access to the site is limited as the territory continues to be controlled by ISIS.\textsuperscript{118}

On April 12, 2015 ISIS released another video depicting the complete destruction of the ancient Assyrian city of Nimrud, located southeast of Mosul.\textsuperscript{119} The site, which dates back to the sixth century BC, was the capi-


\textsuperscript{116} Id. at 21.


tal of the Assyrian empire of Ashurnasirpal II and was on Iraq’s Tentative List of World Heritage Sites. The territory remains under the control of ISIS.

The city of Ashur (Assur, Qal’at Sherqat), which was inscribed on the World Heritage List in 2003, is located within territory controlled by ISIS. Ashur dates back to the third century BC and was once the first capital of the Assyrian empire; it features a number of ancient temples, the Old Palace and its Royal Tombs. In its 2015 report to the World Heritage Committee, the Government of Iraq confirmed that it had conducted air strikes against ISIS targets in and around the area, causing damage to the Old Palace and to the protective glass over the Royal Tombs.

Samarra Archeological City, which lies eighty miles north of Baghdad, continues to remain under government control. The site was inscribed as a World Heritage Site in 2007 and is the only fully preserved Islamic capital dating from the ninth century. An attack by ISIS in July 2014 resulted in some damage to the walls of the Al-Ma’shuq palace located within the site. In October 2014, ISIS militants who had taken temporary control of an area north of Samarra, deliberately destroyed the eleventh century Shrine of Al-Douri, located in the area.

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IV. THE LEGAL LANDSCAPE IN CONTEXT

The number of parties currently involved in the armed conflicts in Iraq and Syria is considerable. As of July 2015, in addition to armed forces of both Iraq and Syria, the armed forces of multiple States are conducting military operations in one or both States. Targeted air strikes, which have been led by the United States under the banner of “Operation Inherent Resolve,” have been conducted as part of a comprehensive strategy to “degrade and defeat” ISIS in Syria and Iraq. In addition to the United States, Canada, Turkey, Saudi Arabia, United Arab Emirates, Jordan, Bahrain, France and, more recently, the Russian Federation are participating in (last visited Oct. 20, 2015). Recent reports indicate that Iran would like to play a role in the coalition against ISIS. Kim Sengupta, War with ISIS: Iran Seeks to Join International Coalition Battling Militants as Part of Significant Shift in Foreign Policy, THE INDEPENDENT (Aug. 18, 2015), http://www.independent.co.uk/news/world/middle-east/war-with-isis-iran-seeks-to-join-international-coalition-battling-militants-as-part-of-significant-shift-in-its-foreign-policy-10461307.html.

125. Although it has become common practice when identifying the applicable law for legal experts to set out an analysis showing the existence of an armed conflict and its classification, in this paper we take the position that the law of armed conflict applies in respect of both Syria and Iraq. Moreover the following analysis is restricted exclusively to a consideration of the rules applicable to non-international armed conflict. In other words, we do not address the issue of whether an international armed conflict exists and consequently do not deal with the rules applicable to IAC.


the airstrikes in Syria. The UK’s involvement in the military operations in Syria remains ambiguous. In Iraq, airstrikes are being carried out by the United States, Australia, Canada, Jordan, Denmark, France, Netherlands and UK. It is far more difficult to identify the organized armed groups (OAGs) that are presently conducting military operations in the territories; nevertheless, the most prominent include the Free Syrian Army, ISIS, Al-Nusra Front and the YPG/YPJ (Kurdish People’s Defense Unit). Each of these parties—States and OAGs—is governed by a complex regime of obligations in respect of cultural property by virtue of treaty, customary international law and domestic law. The adoption by the Security Council of Resolution (SCR) 2199, pursuant to its Chapter VII powers, also means that the protection of Syria and Iraq’s cultural property, as set forth in the resolution, is an obligation that binds all States and not just those involved in the armed conflicts.

A. Obligations on the Parties to the Conflict

The obligations on the parties to the conflicts derive from both treaty and customary international law. The most relevant treaty, to which both Iraq and Syria are parties, is the 1954 Cultural Property Convention. Of the States involved in the airstrikes in Syria and Iraq, only the United Arab Emirates and the United States have not signed the Convention. The convention has been ratified by almost all UN members, though many States have not ratified the First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S 358 [hereinafter First Protocol]. Iraq ratified the Cultural Property Convention and the First Protocol in 1967; Syria ratified the 1954 Cultural Property Convention and the First Protocol in 1958.

132. Operation Inherent Resolve, supra note 127.
133. Whilst the UK is not listed on the U.S. Department of Defense website as having participated in airstrikes, there are reports that UK military pilots have undertaken airstrikes in Syria. See Syria Airstrikes Conducted by UK Military Pilots, BBC (July 17, 2015), http://www.bbc.co.uk/news/uk-33562420; Defence Secretary Criticised over Syrian Airstrikes, COMMON SPACE (July 21, 2015), https://www.commonspace.scot/articles/1939/defence-secretary-criticised-over-syria-airstrikes. UK Defence Secretary Michael Fallon stated in the House of Commons on July 20, 2015: “There are no UK military strikes in Syria, but I have explained to the House that where our personnel are embedded with other forces, they are participating in those countries operations that are approved by their procedures and Parliaments.” 598 Parl Deb HC (6th ser.) (2015) col. 1245 (UK).
134. Operation Inherent Resolve, supra note 127.
Emirates and the UK are not parties to the Convention.\textsuperscript{137} The Convention extends, as a minimum, the core rules on “respect” for cultural property to non-international armed conflict; moreover, article 19(1) makes clear that those obligations apply equally to State and organized armed groups.\textsuperscript{138} The 1999 Second Protocol to the Cultural Property Convention (Second Protocol), which is applicable in its entirety to both IAC and NIAC, introduces a far more comprehensive protection framework, together with a more detailed and fully developed criminal sanctions regime.\textsuperscript{139} Since neither Iraq nor Syria has ratified the Second Protocol, the provisions contained therein are not, as a matter of treaty law, binding.\textsuperscript{140} Nevertheless, as discussed below, there are a number of key provisions on the conduct of hostilities in the Second Protocol that are binding on all the parties to the conflict—States and organized armed groups—by virtue of customary international law. Likewise, although neither Iraq nor Syria is a party to the 1998 Rome Statute of the International Criminal Court (ICC),\textsuperscript{141} the listed offences pertaining to the protection of cultural property in non-international armed conflict contained therein are widely accepted as customary in nature and thus are relevant to the conflicts in both States.\textsuperscript{142} Finally, both Iraq and Syria are parties to the 1970 UNESCO convention prohibiting and pre-

\begin{footnotesize}
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  \item 137. Notwithstanding the fact that some States are not parties to the 1954 Cultural Property Convention, the key provisions pertaining to “respect” are binding on all parties to the conflicts by virtue of customary international law.
  \item 138. 1954 Cultural Property Convention, \textit{supra note} 7, art. 19, on “Conflicts Not of an International Character,” provides that “each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.” These provisions not only bind all parties to a conflict as a matter of treaty law, but also as a matter of customary international law.
  \item 139. Second Protocol, \textit{supra note} 9.
  \item 140. Both Syria and Iraq have been encouraged on a number of occasions to ratify the Protocol. \textit{See, e.g.,} Statement of the Chairperson on behalf of the Committee for the Protection of Cultural Property in the Event of an Armed Conflict (May 21, 2015), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Statement_FINAL_ENG.pdf. Insofar as the Second Protocol is concerned, despite the ambiguous text, the negotiating history supports the conclusion that the said instrument was drafted by States with the intention of binding both States and organized armed groups alike. The latter would be bound, it was reasoned, through the ratification of the State concerned. For further commentary on this point, see Henckaerts, \textit{supra note} 9, at 81, 83–84.
  \item 142. \textbf{INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW} r. 156 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL Study].
\end{itemize}
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venting the illicit trade in cultural property\textsuperscript{143} and the 1972 World Heritage Convention.\textsuperscript{144}

The Cultural Property Convention can be differentiated from previous legal instruments concerned with protecting cultural property in armed conflict in that it requires States to take peacetime protective measures to safeguard cultural property in war.\textsuperscript{145} To meet their treaty obligations, States are expected not only to take measures in peacetime to “safeguard” property of “great importance to the cultural heritage of every people” situated within their own territory against the foreseeable effects of conflict,\textsuperscript{146} but also are required in armed conflict “to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties.”\textsuperscript{147} The requirement to take such measures in peacetime, coupled with the extension of the core obligations to NIAC, effectively entrenches into international law the idea that States have a “public duty” to protect cultural property within their own territory.\textsuperscript{148}

The Convention defers to States to determine what peacetime measures are necessary to meet their obligations in war.\textsuperscript{149} In retrospect, it

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\item Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S 151 [hereinafter 1972 World Heritage Convention].
\item For a list of previous legal instruments see supra note 5. The 1954 Convention invites States to report to UNESCO’s Director-General on national implementation every four years. 1954 Cultural Property Convention, supra note 7, art. 26(2). Parties to the Second Protocol are invited to report on to the Committee for the Protection of Cultural Property in the Event of Armed Conflict on national implementation of the Protocol every four years. Second Protocol, supra note 9, art. 37(2).
\item Id. art. 3.
\item Id. art. 4 (emphasis added).
\item The idea of States having a “public duty” to protect cultural property in its territory can be traced to the French Revolution. See Sax, supra note 34, at 1149, n.33. This obligation has subsequently been reaffirmed in other treaties, including the 1972 World Heritage Convention, supra note 144, art. 4, which states “Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State.”
\item During the negotiations over the treaty, it was recognized that “the financial aspect inherent in safeguarding measures would no doubt constitute an obstacle for countries with limited resources.” TOMAN, supra note 19, at 64. For practical measures that can be taken to safeguard such property in armed conflict see, for example, UK MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.26.7 (2004) [hereinafter BRITISH MANUAL].
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\end{footnotesize}
is far too easy to criticize the Syrian authorities charged with the protection of cultural property for having failed to fully prepare—both on a normative and practical level—for war. Reports submitted to UNESCO, together with statements made by the head of DGAM, indicate that the authorities did take some preventative measures prior to the outbreak of war. Throughout the conflict DGAM has, when possible, taken affirmative steps to safeguard movable heritage, but the lack of resources, together with the fact that much of Syria’s cultural heritage is immovable, has often made protection impracticable. In particular, ISIS’s control over some heritage sites has placed those dedicated to protection at particular risk, as demonstrated by the beheading of the former Director of Palmyra Antiquities in August 2015. Those charged with protection responsibilities in Iraq have also taken similar steps in respect of moveable objects. For example, much of the collection housed originally at the Mosul Museum was apparently transferred to Baghdad before the city was taken over by ISIS. However, as with Syria, it would appear that there is little that can be done to protect immovable property other than to remind the parties to the con-


lict of their obligations to comply with LOAC. The failure on the part of States to take adequate measures in peacetime to safeguard cultural property in war (for example, to identify protected property, to disseminate the information to all parties and/or to mark it with the distinctive cultural property emblem) does not relieve other parties to the conflict of their obligation to respect cultural property.\footnote{154} As State parties to the Cultural Property Convention, both Syria and Iraq would have been entitled to establish a regime of “special protection,” applicable over and above the general protection provided in the treaty; however, neither State appears to have done so.\footnote{155}

Before examining the specific war time obligations set forth in the Cultural Property Convention, it is worth recalling that the overarching customary international law principle of distinction, which requires all parties to distinguish between military objectives and civilian objects, prohibits all attacks on cultural property to the extent that such property is civilian.\footnote{156} In both IAC and NIAC, cultural property may only be attacked if it qualifies as a military objective.\footnote{157} “Cultural property,” insofar as the customary international law obligation is concerned, constitutes “buildings dedicated to religion, art, science, education or charitable purposes and historic monuments.” This primary obligation is supplemented by the equally important obligation on all parties to take special care to avoid damage to cultural property in the course of war.\footnote{158} This customary international law obligation also applies in IAC and NIAC.

Turning to the Convention, the applicability of the rules pertaining to “respect,” which are embodied in Article 4, is contingent on the existence

\footnote{154} 1954 Cultural Property Convention, supra note 7, art. 4(5).

\footnote{155} Even if such a regime was in place, it is unclear as to whether there is an obligation to grant enhanced protection to cultural property in NIAC. WILLIAM BOOTHBY, THE LAW OF TARGETING 447–49 (2012).

\footnote{156} See CIHL Study, supra note 142, rr. 7–10.

\footnote{157} Id. rr. 10, 38(B). The definition of “military objectives” is set forth in AP I, supra note 8, art. 52(2). The definition includes “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” This definition reflects customary international law and applies in international and non-international armed conflict.

\footnote{158} Id. r. 38(A).
of an armed conflict, whether international or non-international. Article 4(1) requires States

to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

Article 4(2) introduces a waiver to the obligations but “only in cases where military necessity imperatively requires such a waiver.” Finally, Article 4(3) requires States “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.” Article 4(1)–(3) is recognized as reflecting norms of customary international law applicable to non-international armed conflict.

159. See 1954 Cultural Property Convention, supra note 7, arts. 18–19 (on “Scope of Application of the Convention”). As with all similar treaty provisions, neither article defines what constitutes an armed conflict. Article 19 expressly extends the scope of the obligations to non-international armed conflict. Article 19 stipulates “in the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provision of the present Convention which relate to respect for cultural property.”

160. On the obligation to respect cultural property, see DOD LAW OF WAR MANUAL, supra note 28, ¶ 17.11.2, which notes that this obligation “includes essentially negative duties, i.e., duties to refrain from acts of hostility directed against cultural property and duties to refrain from the use of cultural property in support of military operations where such use is not imperatively necessary.”

161. One perverse effect of this is that States party to AP I and AP II, but not party to the 1954 Convention, are in theory held to a higher standard since neither AP I nor AP II allows for a waiver.

162. Notwithstanding the fact that the provision applies to NIAC by virtue of Article 19, the content of Article 4 was clearly drafted with IAC in mind, as demonstrated by Article 4(4) which requires the parties to “refrain from any act directed by way of reprisals against cultural property.”

163. Prosecutor v. Tadić; Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); CIHL Study, supra note 142, rr. 38–40. Although the material scope of the Hague Convention and Additional Protocol II differ, Article 16 of the latter prohibits attacks on cultural property as well as their use for military purposes.
The prohibition on use, as set forth in the first limb of Article 4(1), is generally interpreted widely since the object and purpose of the provision is to protect cultural property from the effects of warfare. This rule is founded on the reasoning that if the property is not being used for military purposes, there is no justifiable reason to attack it. As elaborated in the U.S. Department of Defense’s 2015 Law of War Manual, uses that would be likely to expose such property to damage and destruction include: “(1) using the cultural property for military purposes; (2) placing military objectives near cultural property; or (3) using the cultural property in such a way that an adversary would likely regard it as a military objective.” Thus, as O’Keefe points out, the phrase “any use . . . for purposes which are likely to expose it” includes de facto and passive use.

The militarization of World Heritage Sites by establishing military bases, positioning armed units and fighters or emplacing artillery, mortars and other military equipment within and around, for example, Palmyra, Aleppo Citadel, or Crac de Chevalier, as was done by government and opposition forces, would unambiguously fall foul of Article 4(1) on use.

164. British Manual, supra note 149, ¶ 5.25.3.
166. O’Keefe, supra note 27, at 124. See also 1977 AP Commentary, supra note 21, ¶¶ 2077–78, which refers to “passive” and “active” support. As emphasized in the DoD manual, the prohibition embodied in Article 4(1) must be distinguished from the separate customary international law prohibition on using cultural property “to shield military objectives from attack, or otherwise to shield, favour, or impede military operations.” DoD Law of War Manual, supra note 28 ¶ 5.18.3. As is further explained, in practice this means that in some close cases the location of a military objective in the midst of a populated town may violate Article 51(7) API if the purpose of the location is to shield the military unit or facility from attack. On the other hand, the same act could be innocent if it were militarily necessary to so situate the unit or facility. Thus the subjective intent of military commander is the controlling element in determining whether there has been a breach of para 7 . . . or a legitimate act of war.

Id. ¶ 5.16.2, n.398 (emphasis in original).
167. Statement by U.N. Secretary-General Ban Ki-Moon:

World Heritage Sites have suffered considerable and sometimes irreversible damage. Four of them are being used for military purposes or have been transformed into battlefields: Palmyra, the Crac des Chevaliers; the Saint Simeon Church in the Ancient Villages of Northern Syria; and Aleppo, including the Aleppo Citadel. Archaeological sites are being systematically looted and the illicit trafficking of cultural objects has reached unprecedented levels.

Joint Statement by UN, UNESCO & League of Arab States, supra note 79. See findings of satellite imagery collected in 2014, which indicate that the ancient site of Ebla in Idlib province, which is on Syria’s Tentative List, was also militarized. AAAS Report, supra note
This prohibition would also apply to other religious and cultural property including, for example, the use of the minarets or citadels (for example, Homs Citadel and al-Madiq in Hama Province) and medieval ruins and fortifications.\footnote{168} The positioning of snipers or artillery within and around such sites risks transforming the property into a military objective. Moreover, since Article 4(1) of the 1954 Cultural Property Convention also forbids any use likely to expose the property to damage during conflict, the parties would be in breach of this obligation even if the particular use does not result in the property coming under attack.

However, the prohibition on use is not absolute and must be read subject to the waiver in Article 4(2).\footnote{169} In other words, if military necessity imperatively requires the use of cultural property and its surroundings for purposes likely to expose it to attack, such use is not prohibited. Although there is general consensus among States that the waiver should be


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  government forces placed military objectives in and around objects of great cultural significance. Satellite imagery showed military posts being constructed in the pre-Roman city of Palmyra (Homs). Such posts incorporate ancient structures or were built on their remains. The Government, in building and positioning military objectives in and around Palmyra, has breached its obligations to respect and protect cultural property under the Convention for the Protection of Cultural Property in the Event of Armed Conflict.
\end{quote}


\begin{quote}
  across the Syrian Arab Republic, historic monuments are being damaged and destroyed. No party to the conflict is abiding by its obligation to respect cultural property and to avoid causing damage to it in the context of military operations. Both government forces and anti-government armed groups have rendered sites open to attack by placing military objectives in them.
\end{quote}


\footnote{168} See the British Manual which cautions against use of “a church tower or mosque minaret” as a military observation post. BRITISH MANUAL, supra note 149, ¶ 5.25.3.

\footnote{169} During the negotiations over the treaty text, there were disagreements over whether a waiver should be integrated into the text of the convention. For a useful background, see Toman’s discussion on “Military Necessity” in TOMAN, supra note 19, at 72–79.
interpreted restrictively, disagreeements continue to surface on its precise contours and application to specific situations. The Second Protocol offers some guidance in that it provides that a waiver on the basis of imperative military necessity may only be invoked to use cultural property for military action “when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage.” In other words, there must be no other feasible option available to achieve the military objective. This does not fully resolve the matter since disputes are bound to materialize over what constitutes a similar military advantage or indeed what is deemed feasible. Whether or not the parties to the conflict have violated this prohibition would seem to turn on whether, all things considered, the decision of the commander to use the property (and thus potentially render it a military objective) was a compelling one in light of the military objectives at the material time and whether there were any other feasible options available to preclude the choice made.

170. See for example, British Manual, supra note 149, ¶ 5.25.3, referring to “rare cases where it is essential to use cultural property for military purposes is a historic bridge which is the only available river crossing.”

171. The lack of a definition for “military necessity” was criticized in the Boylan Report, supra note 34, which led to an attempt to clarify its precise scope in the 1999 Second Protocol.

172. Second Protocol, supra note 9, art. 6(b).

173. A way in which to minimize these potential difficulties is for States to fully embrace the “enhanced protection” regime introduced in the Second Protocol, which does not allow for a waiver. One of the conditions for registering for enhanced protection is abstention from its use for military purposes. In the case of general protection, the holder of the property has the right to convert the property into a military objective by using it for military action, but under the enhanced protection regime there is no such right. To do otherwise would amount to a serious violation of the Second Protocol and the offender would be liable to criminal prosecution.

174. But see a recent Oral Update of the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, which states, “in some instances, government forces have based in historic citadels such as the Aleppo citadel or the fort above Tadmor, rendering them military objectives. It is not determined that such exposure of historic sites to damage or destruction was imperatively required by military necessity.” UNHRC Oral Update on Syria, supra note 46, ¶ 45. See also Corn, who reasons that the use of cultural property as an observation position appears consistent with the principles reflected in the Cultural Property Convention if such use is the only feasible means available for the commander to achieve a valid military objective. Certainly, the protection of friendly forces or the local population from threats posed by dissident or hostile elements during a period of occupation qualify as such a purpose. In the opinion of this author, the key consideration in analyzing the permissibility of such use would be the legitimacy of
The use by a party of cultural property in violation of the prohibition does not mean that the opposing side is entitled to attack the property. In other words, the second limb of Article 4(1) of the 1954 Cultural Property Convention, which prohibits “acts of hostilities” continues to apply.\textsuperscript{175} Such acts not only include attacks, but also any other acts that result in the damage or destruction of the protected property. All attacks targeting, for example, the Crac des Chevaliers, Palmyra, Aleppo, Damascus, Ashur and all other religious and cultural property of great importance across Syria and Iraq would fall foul of this prohibition. Likewise, the deliberate destruction of religious and cultural property by ISIS (and indeed by any other party) would unambiguously violate Article 4(1).\textsuperscript{176} Since the prohibition encompass acts that do not have to constitute attacks, but which nevertheless cause damage or destruction, illegal excavations by the parties to the conflict (which might include, for example, excavations at Palmyra, Mari, Dura Europos, Apamea and Ebla) would also appear to breach this prohibition.\textsuperscript{177}

However, as with the first limb of Article 4(1), the second limb is also subject to the Article 4(2) waiver.\textsuperscript{178} In other words acts of hostilities, including attacks, on cultural property are permissible if imperatively required by military necessity. Thus, the waiver parallels the basic customary international law prohibition that cultural property is generally civilian property and as such may not be attacked unless it constitutes a military objective.\textsuperscript{179} The determination of whether the said property constitutes a “military objective” must be interpreted in line with existing customary international law. Article 52(2) of the 1977 Additional Protocol I to the Geneva Conven-

\textsuperscript{175}O’Keeffe, supra note 2\textsuperscript{7}, at 126 (citing statement by Legal Committee during the drafting of the Convention).


\textsuperscript{177}1954 Cultural Property Convention, supra note 7, art. 1(a) specifically includes archaeological sites as property of great importance to the cultural heritage of every people.

\textsuperscript{178}If acts of hostilities can be interpreted to extend to illegal excavations by the parties, the waiver is clearly irrelevant.

\textsuperscript{179}It should be noted that the effect of AP II, supra note 8, art. 16, is that cultural property may be attacked only on account of its use. For further commentary, see O’Keeffe, Protection, supra note 2\textsuperscript{1}, at 435.
tions sets forth the customary international law definition of military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” This definition is also applicable to NIAC.

As Henckaerts comments:

The definition of military objective contains two criteria which have to be fulfilled cumulatively before objects can be destroyed, captured or neutralized. They deal with the nature, location, purpose or use of objects and with the military advantage to be gained by destroying, capturing or neutralizing them. The nature, location, purpose or use of the object has to be such that it makes an “effective contribution to military action.” The military advantage has to be “definite, in the circumstances ruling at the time.”

Most experts have been quick to dismiss the possibility that in contemporary conflicts cultural property would by its nature, location or purpose make an effective contribution to military action and therefore constitute a military objective. While it is not inconceivable that cultural property might by its nature, location or purpose make an effective contribution to military action, as O'Keefe notes, “it is principally through its use . . . that cultural property could be expected to make an effective contribution to military action.” In the case of Syria, it is the use of cultural property in support of military action that has most likely served as

182. Henckaerts, New Rules, supra note 180, at 600–01.
183. It is worth recalling that the Commentary to Additional Protocol I recognizes that there are objects which by virtue of their location, make an effective contribution to military action. This may be, for example, a bridge or other construction, or . . . a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it.
the reason to justify attacking it. The reality on the ground is that many of the cultural heritage sites in Syria that had an important military role in conflicts over the ages are now having the same strategic role in the current conflicts. These sites were constructed in their particular locations—on high ground or at important intersections on crossroads—for the very purpose of providing a military advantage and time has not deprived the properties of those qualities. The offensive and defensive value of, for example, Crac de Chevallier, Aleppo’s Citadel or Bosra Castle are as pertinent in the current conflicts as they were when first constructed, which is precisely why all the parties have continued to battle for control over them.185 While it is not permitted to destroy cultural property which does not make any contribution to military action nor property which has temporarily served as a refuge for enemy fighters but is no longer used as such, attacking property being used by the adversary, as in many of the situations described above, may have presented, depending on the particular circumstances ruling at the time, a “definite military advantage” to the attacker.186

In the event that cultural property does lose its protective status and thereby becomes a military objective, an attacking party must comply with the principle of proportionality and the requirement to take all feasible precautions in attack.187 Had Syria and Iraq been parties to the Second Protocol, these conditions would have been binding as a matter of treaty law.188 Nevertheless, the obligations are binding on all parties as a matter of customary international law.189 The principle of proportionality requires the parties to refrain from attacks, which may be expected to cause incidental damage to cultural property which would be excessive in relation to the

185. See DoD LAW OF WAR MANUAL, supra note 28, ¶ 5.18.5.1 (stating “military necessity generally would imperatively require the seizure or destruction of cultural property that is being used by the adversary”).

186. See 1977 AP COMMENTARY, supra note 21, ¶ 2079 (stating “it is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuge for combatants, but is no longer used as such”).

187. The obligation to take all feasible precautions in attack is set forth in AP I, supra note 8, art. 57. Although AP II does not contain an explicit reference to this obligation, it is widely accepted that the obligation does apply in NIAC as a matter of customary international law. See in particular, CIHL Study, supra note 142, rr. 15–19.

188. See Second Protocol, supra note 9, arts. 1(f), 6(a)(i), 6(d), 7–8.

189. BOOTHBY, supra note 155, at 443–45; SIVAKUMARAN, supra note 9, at 349–57.
concrete and direct military advantage anticipated.\textsuperscript{190} If it becomes apparent that this principle cannot be satisfied, an attack must be cancelled or postponed. It may well be that the decision on the part of those States involved in Operation Inherent Resolve not to target ISIS at Palmyra rests on this principle. The parties are also required to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any case minimizing, incidental damage to cultural property. It would follow that the use of barrel bombs by the Syrian armed forces, not least in the ancient city of Aleppo, may constitute a violation of this rule on the grounds that such weapons are inherently indiscriminate.

In Syria a significant proportion of the damage and destruction to cultural property appears to be incidental in nature and caused by the clashes between the opposing groups. In all attacks against opposing forces, the parties are required to comply with the rules pertaining to the conduct of hostilities, one of the “cardinal principles” being that of distinction.\textsuperscript{191} The principle, which applies in NIAC, is the basis upon which the customary international law prohibition on attacks against civilian objects—including cultural objects—is grounded. It follows that in all attacks, the parties are required to do everything feasible to verify that the objectives to be attacked are not civilian and, more specifically, not protected pursuant to the 1954 Cultural Property Convention.\textsuperscript{192} In addition to the prohibition on attacks against civilian property, indiscriminate attacks are also prohibited as a matter of customary international law.\textsuperscript{193} As Sivakumaran notes,

\begin{itemize}
  \item the prohibition on indiscriminate attacks does not suggest that there are “means or methods of combat whose use would involve an indiscriminate attack in all circumstances,” as the rule requires regard to be had to all the circumstances. It is the use of such means and methods
\end{itemize}

\textsuperscript{190} AP I, supra note 8, art. 51(5)(b); Second Protocol, supra note 9, arts. 7(e), 7(d)(ii).
\textsuperscript{191} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78, (July 8).
\textsuperscript{192} See, e.g., Second Protocol, supra note 9, art. 7(a).
\textsuperscript{193} Hague Regulations, supra note 5, art. 27. Two types of attacks are prohibited: (1) attacks that are not specifically directed against military objectives (in short, no attempt was made to identify a specific military objective); and (2) attacks which treat a number of distinct and separate military objectives co-located with civilian or civilian objects as a single entity. Particularly in densely populated cities like Aleppo, the parties are under an obligation, where it is feasible, to conduct separate attack on each such objective. If this is not possible, the decision-maker must determine whether the attack is proportionate.
rather than the means and methods themselves that tend to violate the prohibition.194

Thus, even if barrel bombs were held not to be indiscriminate per se, it is their use, for example, in the Old City of Aleppo or at Ma’arrat al Numan Museum, that would give rise to the likelihood of a violation.195 To summarize, even if the target of attack is a lawful military objective and the strike is discriminate, to be a lawful attack, the parties must take all feasible precautions in attack;196 comply with the principle of proportionality;197 and cancel or suspend an attack if the objective is protected property or the damage to cultural property would be excessive in relation to the concrete and direct military advantage anticipated.198

Article 4(3) of the Cultural Property Convention requires States to “prohibit, prevent and if necessary put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.” The undertaking set forth in Article 4(3), which extends to all persons whether they are members of the armed forces, organized armed groups, criminals gangs or local population,199 is of particular pertinence to the armed conflicts in both Syria and Iraq in light of the wide-scale pillaging and misappropriation of archaeological sites and museums as documented above. Although in international armed conflict military commanders have an obligation to take reasonable measures to prevent or stop any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property, whether a similar obligation extends to NIAC remains uncertain. Nevertheless, since the duty on the State to safeguard cultural property is not extinguished by the existence of an armed conflict,

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194. SIVAKUMARAN, supra note 9, at 347.
196. Second Protocol, supra note 9, art. 7(b); CIHL Study, supra note 142, rr. 15–16.
197. Second Protocol, supra note 9, art. 7(c); CIHL Study, supra note 142, r. 18.
198. Second Protocol, supra note 9, art. 7(e); CIHL Study, supra note 142, r. 19.
it would logically follow that there is such an obligation on commanders in NIAC.\textsuperscript{200}

Notwithstanding the fact that article 4(3) fails to expressly prohibit theft, pillage, misappropriation, confiscation or vandalism of cultural property, as O’Keefe reasons, “a prohibition to this effect must be implied, reasoning a fortiori.”\textsuperscript{201} That such acts also constitute customary international law prohibitions in NIAC is in no doubt.\textsuperscript{202} The “industrial” scale of the illegal excavations, particularly in Syria but also in Iraq, coupled with the widespread looting of museums and the vandalism of cultural property, not least by ISIS, means that this prohibition is of particular relevance in the current conflicts.

The record demonstrates that the majority of the parties to the armed conflicts in Syria and Iraq appear to have failed to comply with their obligations to respect cultural property in violation of treaty and/or customary international law norms. The consequence of non-compliance is explored in the following subsection.

B. Consequences of a Failure to Comply with Obligations

Although the establishment of a mandatory regime to criminalize breaches of the Cultural Property Convention was one of its main aims, the treaty has never served as a basis for prosecutions, primarily due to the lack of

\textsuperscript{200} G.A. Res. 69/281, ¶ 4 (May 28, 2015) (stating “all parties to an armed conflict shall prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”). See also MICHAEL SCHMITT, CHARLES GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY § 4.2.2, ¶ 5 (2006) (stating “commanders who are in control of areas where cultural property (such as a museum) is located must take special care to protect it from pillage, not only by their own troops, but also by others.”).

\textsuperscript{201} O’Keefe, Protection, supra note 21, at 443, ¶ 2. The CIHL Study commentary inaccurately states that Article 4 prohibits such conduct. CIHL Study, supra note 142, at 134.

\textsuperscript{202} Evidence includes: adoption of Article 15(1)(e) in the Second Protocol, supra note 9, which recognizes, as a war crime, theft, pillage or misappropriation of, or acts of vandalism directed against cultural property in NIAC; the case law of international tribunals; the criminalization in NIAC of pillage and the seizing of enemy property in the Rome Statute, supra note 141, arts. 8(2)(e)(v), 8(2)(e)(xii); and the widespread condemnation of such acts by States and the UN (e.g., G.A. Res. 69/281 (May 28, 2015)). See also O’Keefe, Protection, supra note 21, at 443, ¶ 1 (on the customary international law status of the prohibitions to NIAC).
clearly delineated criminal offences. This shortcoming was addressed with the adoption of the Second Protocol, which sets forth a list of specific offences. Since neither Syria nor Iraq is a party to the Protocol, only

203. However, the Extraordinary Chambers in the Courts of Cambodia (ECCC) does have jurisdiction, pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), amended by NS/RKM/1004/006, art. 7 (Oct. 27, 2004), http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (stating that it may “bring to trial all suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Cultural Property Convention . . . which were committed during the period from 17 April 1975 to 6 January 1979”). The 1954 Cultural Property Convention, supra note 7, art. 28, requires States to adopt domestic legislation to “prosecute and impose penal or disciplinary sanctions on those persons, of whatever nationality, who commit or who order to be committed a breach of the . . . Convention.” Although it has been questioned (on a narrow reading of Article 19) whether the said article applies to NIAC, the failure to observe the obligations set forth in Article 4 on “respect” necessarily constitutes a breach of the Convention. Thus, a more satisfactory reading is that the provision does apply. For further commentary, see Roger O’Keefe, Protection of Cultural Property under International Criminal Law, 11 MELBOURNE JOURNAL OF INTERNATIONAL LAW 339, 360 (2010) [hereinafter O’Keefe, International Criminal Law]. One of the main drawbacks of the Convention was the lack of clearly delineated criminal offences. This weakness was addressed with the adoption of the Second Protocol but, since neither Syria nor Iraq are parties to the Protocol, the legal consequences of violations of the Protocol are not addressed in this paper (for a detailed analysis on the legal consequences of violating the Protocol, see id. at 370–79).

204. 1954 Cultural Property Convention, supra note 7, art. 28 merely requires States: “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.” In contrast, the Second Protocol, supra note 9, art. 15(1), establishes a far more detailed framework including identifying five categories of serious violations:

(a) making cultural property under enhanced protection the object of attack;
(b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
(c) extensive destruction or appropriation of cultural property protected under the Hague Convention and the Second Protocol;
(d) making cultural property protected under the Hague Convention and the Second Protocol when it is the object of attack;
(e) theft, pillage, or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

The first two offenses relate to cultural property under enhanced protection and the last three concern property under enhanced protection and general protection. The Second Protocol also establishes through Article 21 the two following categories of violations which plug existing loopholes:
those war crimes recognized under customary international law as applicable to NIAC can be considered. What is immediately apparent is that, notwithstanding the prohibition on the use of cultural property, a violation of the prohibition does not incur individual criminal responsibility in customary international law. That said, there is now a well-settled body of international criminal law whereby individuals can be held accountable for the unlawful destruction, damage and appropriation of cultural property due in large measure to the establishment of international criminal tribunals.

Two comments are merited. First, it should be noted that this body of law (because it is customary in origin rather than treaty-based) has evolved on the basis of what constitutes cultural property as set forth in the 1907 Hague Regulations rather than as defined under the 1954 Convention. Consequently, protection is not limited to objects that are “of great importance to the cultural heritage of every people” but afforded more broadly to “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” or “buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments.” Second, to constitute a war crime, the destruction of cultural property must have some “nexus” to the armed conflict. In other words, the existence of the conflict must, at a minimum, play “a substantial part in the perpetrator’s ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.” Since the international criminal law stand-

(a) Any use of cultural property in violation of the Convention or this Protocol and any illicit export; and
(b) other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or the Second Protocol.

Second Protocol, supra note 9, art. 21.

205. We will not explore the possibility of crimes against humanity.

206. Attacks on cultural property which has been accorded “enhanced protection” pursuant to the Second Protocol would, by contrast, amount to a serious violation of the Protocol and incur criminal responsibility.

207. Per the definition set forth in Statute of the International Criminal Tribunal for the former Yugoslavia art. 3(d), S.C. Res. 827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808.

208. Per definition set forth in the Rome Statute, supra note 141, art. 8(2)(c)(iv).

209. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 58 (Int’l Crim. Trib. for the former Yugoslavia June 12, 2002). Importantly, the Chamber further elaborated,
ard is not always coterminous with the LOAC standard, the criminalization of an act may not necessarily fully capture the scope of the underlying prohibition.

The war crime of unlawful attacks against cultural property is a well-established offence under customary international law and applicable to both IAC and NIAC. For example, in January 2013, the ICC Prosecutor opened an investigation into war crimes in Mali, including crimes intentionally directing attacks against protected objects. On 26 September 2015, on the back of an arrest warrant issued by the ICC, Niger transferred Ahmad Al Faqi Al Mahdi to the Court to face charges for intentionally directing attacks against nine mausoleums and the Sidi Yahia mosque in Timbuktu. Whether or not individuals can be held accountable for the catalogue of attacks against cultural property in the conflicts in Syria and Iraq is likely to turn on whether the cultural property constituted a military objective at the material time, since criminal responsibility attaches to intentionally directing attacks against the said property provided it is not a

what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. If it can be established that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.

Id.

210. Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR73.3, Interlocutory Appeal of Trial Chamber Decision, ¶¶ 44–48 (Int’l Crim. Trib. for the former Yugoslavia Mar. 11, 2005); CIHL Study, supra note 142, r. 156. The term “attack” is defined as “acts of violence against the adversary, whether in offence or defence.” AP I, supra note 8, art. 49.

211. ICC Prosecutor Opens Investigation into War Crimes in Mali, ICC (Jan. 16, 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx. Tribunals have treated unlawful attacks directed at cultural property as a lex specialis offence. For example, the ICTY has stated, “the crime of destruction or wilful damage of cultural property under Article 3(d) of the Statute is lex specialis with respect to the offence of unlawful attacks on civilian objects.” Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶ 277 (Int’l Crim. Trib. for the former Yugoslavia Jul. 17, 2008). However, because there is essentially no difference between the elements in respect of such attacks and attacks against civilian objects more generally, the idea that cultural property is specially protected is largely absent. See Micaela Fuilli, The Criminalization of Offence against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency, 22 EUROPEAN JOURNAL OF INTERNATIONAL LAW 203–17 (2011).

military objective. As in all armed conflict, there are easy cases but very many that are less so, as implicitly acknowledged in the text of the 2015 General Assembly resolution on “Saving the cultural heritage of Iraq,” which affirms that “attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.” The only clear cut incidences of intentional attacks directed at protected property, which were unequivocally not military objectives, are those involving the deliberate destruction of property by ISIS militants.

In contrast to the war crime of unlawful attacks, it remains unclear as to whether intentionally launching an attack in the knowledge that it will cause incidental damage to civilian objects, including cultural property, which is excessive in relation to the concrete and direct military advantage anticipated (in other words, incidental damage to cultural property) does give rise to individual criminal responsibility in NIAC. No decisions by international tribunals are available to shed any light on the matter. Excessive incidental damage in IAC is expressly criminalized in the Rome Statute but no mirror offense is listed for NIAC, despite the fact that such conduct is prohibited in NIAC.

Individual criminal responsibility for unlawful acts of hostility—other than attacks—against cultural property is recognized to constitute a war crime in IAC and NIAC. As O’Keefe notes, such acts are treated in the Rome Statute “under the general rubric of the customary war crime of destroying (which is taken to encompass damaging) the enemy’s [adversary’s] property, unless such destruction (or damage) is imperatively justified by military necessity.”

213. Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the former Yugoslavia Apr. 3, 2007); Prosecutor v. Strugar, Case No. IT-01-42-AR72, Appeals Chamber Judgment (Int’l Crim. Trib. for the former Yugoslavia July 17, 2008). It is for the prosecution to establish that the destruction was not justified by military necessity. Rome Statute, supra note 141, art. 8(2)(c)(iv) sets forth the customary international law offense of unlawful attacks in NIAC: “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”


demanded by the necessities of war. For example, the Security Council reaffirmed that the “destruction of cultural and religious sites” by “armed rebels, terrorist and other extremist groups” may amount to crimes under the Rome Statute in Security Council Resolution 2085 when strongly condemning such acts in Mali.

It follows that the systematic and deliberate destruction of cultural property by ISIS militants as part of the group’s campaign against “idolatry” would constitute war crimes as suggested by UNESCO’s Director-General not least because the potentially contentious issue of military objectives simply does not arise in those cases. In much of the literature, the destruction by ISIS has been described as yet another display of the mindless “barbarity” that has come to symbolize the group as acts of “cultural nihilism” or “religious iconoclasm” reminiscent of the Taliban’s demolition of the Buddhas of Bamiyan. But although ISIS’s conduct is evocative of the latter, the two situations give rise to different legal outcomes on the grounds that, in the case of the Taliban, the requisite nexus to the armed conflict was tenuous at best. In the case of ISIS, the armed

218. Rome Statute, supra note 141, art. 8(2)(e)(xii) is founded on the prohibition set forth in the 1907 Hague Regulations, supra note 5, art. 23(g), and recognizes as a war crime in NIAC “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.”


220. One of the most challenging aspects of prosecuting war crimes is that, often, the fact of conflict makes evidence gathering difficult if not impossible. However, given ISIS’s insatiable appetite for publicity and self-promotion, there are digital records, often posted by the militants themselves, recording their trail of destruction.


223. Following the destruction of the Buddhas, the General Conference of UNESCO adopted the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage. The Preamble makes reference to the Rome Statute, supra note 141, art. 8(2)(e)(iv), pertaining to intentional attacks rather than to Article 8(2)(e)(xii) on destruction. That said, the latter war crimes refers to the destruction of property “of an adversary” which clearly did not apply in that case.

conflicts have certainly enabled the militants to carry out their campaign of destruction. Moreover a significant proportion of property that has been destroyed appears to have been targeted on the basis of constructed divides that correspond closely to the conflicts. In other words, at times, the conflict has collapsed into a Shia-Sunni divide, which in turn often played a substantial part in the decision of ISIS to specifically target religious and cultural property associated with groups other than the Sunni community.  

225. The drawback to treating the conflict as one that is based simply on a Sunni/Shia divide is that it not only fails to capture the complexity of the situation, but it is also counter-factual on at least two fronts. First, when expedient, ISIS has directed its violence against Sunni communities with little concern for religious denominations. For example, in August 2014, over seven hundred members of the Sunni Shaitat tribe were massacred by ISIS in eastern Syria and, in late 2014, members of the Albu Nimr tribe were also massacred. See, respectively, Liz Sly, Syria Tribal Revolt against Islamic State Ignored, Fueling Resentment, THE WASHINGTON POST (Oct. 20, 2014), https://www.washingtonpost.com/world/syria-tribal-revolt-against-islamic-state-ignored-fueling-resentment/2014/10/20/25401b0b-8de8-49f2-86d4-c1efbee45232_story.html; Martin Chulov, ISIS Kills Hundreds of Sunnis from Albu Nimr Tribe in Anbar Province, THE GUARDIAN (Oct. 30, 2014), http://www.theguardian.com/world/2014/oct/30/mass-graves-hundreds-isis-sunnis-killed-albu-nimr. Second, ISIS has justified its campaign of destruction on the basis that they oppose all religious forms of idolatry, past and present, as aptly demonstrated by the choice objects and property that have been destroyed. No exception is made for Sunni property as demonstrated by the destruction of the shrines of Imam Yahya al-Qassin, Nabi Danial & Abu al-‘Ulah. Hassan Hassan, Religious Teaching that Drives ISIS to Threaten the Ancient Ruins of Palmyra, THE GUARDIAN (May 24, 2015), http://www.theguardian.com/world/2015/may/24/palmyra-syria-isis-destruction-of-treasures-feared. This is not to deny that the ability of ISIS to take root in Iraq resulted from the increasingly sectarian policies pursued by former Prime Minister Maliki during his eight years in power during which time the Sunni community became increasingly alienated. However, to describe the conflict as a Sunni/Shia one does injustice to both communities by treating them as homogenous, thus divesting them of diversity. The relationship between ISIS and the Sunni population is complex and dynamic with a large proportion of Iraqis in the territories under ISIS’s control regarding the militants as foreign terrorists and even those who tolerate the group appear to do so on the grounds that they are the better of two evils. Munqith al-Dagher, How Iraqi Sunnis Really Feel about the Islamic State, THE WASHINGTON POST (Mar. 24, 2015), http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/24/how-iraqi-sunnis-really-feel-about-the-islamic-state/. What is more, a growing number of Sunnis are fighting with Shia forces to oust ISIS. For a useful summary on the rise of ISIS, see Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria, § II (Nov. 14, 2014), http://watchlist.org/wordpress/wp-content/uploads/HRC-CRP-ISIS-14-11-2014-FINAL.pdf.  

691
The war crime of pillage is also firmly established in customary international law and is applicable to NIAC. Pillage is often used synonymously with “looting” and “plunder” and involves the illegal and deliberate acquisition of public or private property; it extends to “both widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain.” Although both treaty and customary international law recognize exceptions to the prohibition in IAC, no such exception exists in NIAC. In principle, all persons involved in the lootings of archeological sites and of museums in Syria and Iraq can be held individually liable and charged with the war crime of pillage. However, despite the fact that the theft of objects from archeological sites may indeed constitute the war crime of pillage, the illegal excavations of the sites represent far more than just the theft of ancient artifacts. This is because archeology today is not about collecting objects but rather about collecting contextual data. It is because the illegal excavations are destroying that information that the harm done exceeds pillage and more closely represents the destruction of heritage.

Given the extent of the illegal excavations, prosecutions appear warranted. But since a nexus to the conflict must first be established, problems may surface in respect of those criminals who were already involved in illegal excavations prior to the outbreak of the conflicts. What must also be taken into account is that there is significant evidence to indicate that a large number of the illegal excavators are “subsistence looters” or those who have turned to looting in order to survive. Prosecutions would appear

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226. See, e.g., Rome Statute, supra note 141, art. 8(2)(c)(v), which recognizes the war crime of pillage in NIAC.

227. DOD LAW OF WAR MANUAL, supra note 28, ¶ 5.17.4.1.


229. Adel Yahya, Looting and “Salvaging” the Heritage of Palestine, PRESENT PASTS (Aug. 17, 2010), http://www.presentpasts.info/articles/10.5334/pp.26/. The “upside” to commodification is that the cultural property is likely to be protected from destruction for the sole reason that it possesses exchangeable value. However, there are two strong arguments against not taking measures to address the illicit trade: first, the income does provide a source of revenue which in one way or another contributes to greater insecurity and, second, commodification does not address the destructive aspect of illegal excavations. For an insight into these issues, see Alexander Bauer, The Destruction of Heritage in Syria and Iraq and its Implications, 22 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 1 (2015).
inappropriate in very many of those cases. Last, but not least, although there is evidence to indicate that ISIS is indeed benefiting from illegal excavations, they appear to be deriving an income through the licensing and/or taxing of the trade and, as such, the war crime of pillage is an uneasy “fit.” This is not surprising since international criminal law is essentially founded on the violation of LOAC prohibitions and LOAC does not concern itself with illicit trafficking in armed conflict, except in the context of occupation.  

The primary international legal instrument governing the illicit trade in antiquities is the 1970 UNESCO Convention, which imposes an obligation on States to protect cultural property and to implement domestic legislation against theft and pillage. Although both Syria and Iraq are States parties, the Convention has a number of shortcomings, the most problematic being its material scope of application. Article 1 defines cultural property as “specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”; in short, inventoried cultural objects stolen from a museum or similar institutions. As a consequence, unlawfully excavated objects appear to fall outside the scope of the Convention. Even if it was possible to interpret the material scope of the convention to include illegally excavated objects, as with all such conventions, the effectiveness of the 1970 Convention is contingent on the implementation of the obligations by all States. For one reason or another, this has not happened. The ineffectiveness of the existing legal regime, because it is founded on State consent, was implicitly recognized when, with the adoption of Resolution 1483 of 2003 on Iraq, the Security Council included within the text of the resolution a provision expressly addressing the illicit trade in Iraq’s cultural property. Resolution 1483, adopted pursuant to the UN Charter (1945), Art. 24.

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231. See First Protocol, supra note 136; CIHL Study, supra note 142, r. 4 and accompanying text.

232. 1970 UNESCO Convention, supra note 19, art. 5.


234. S.C Res. 1483, ¶ 7 (May 22, 2003). The Resolution requires all Member States to
to the Council’s Chapter VII powers, requires States to take appropriate steps to prohibit the illegal trade in Iraqi cultural property. Taking its cue from that resolution, when the Security Council adopted Resolution 2199 in February 2015, a similar obligation was inserted into the text but in respect of Syria’s cultural property. As a legally binding measure applicable to all States, the Resolution bypasses State consent to fill a gap in the normative regime, thereby, in theory, enhancing the protection of the cultural heritage of both States. Moreover, because the Resolution was adopted pursuant to the Council’s Chapter VII powers and only applies to property which originates from Iraq and Syria after a certain date, it is an exceptional measure that leaves undisturbed the existing international legal regime governing the illicit trade in antiquities, which continues to operate on the basis of State consent.

235. S.C Res 2199, ¶ 17 (Feb. 12, 2015). The Resolution reaffirms the Council’s decision in paragraph 7 of resolution 1483 (2003) and requires all Member States to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.

236. The Resolution was welcomed by the UNESCO Director-General. UNESCO Director-General Welcomes UN Security Council Resolution to Step Up Protection of Cultural Heritage in Syria and Iraq, UNESCO MEDIA SERVICES (Feb. 12, 2015), http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_welcomes_un_security_council_resolution_to_step_up_protection_of_cultural_heritage_in_syria_and_iraq#.VZPF1svbLIU (The Director-General also stated that by “extending to Syria the prohibition of trade of cultural objects already in place for Iraq since 2003 [the Resolution would provide] enhanced protection of cultural heritage.”).
V. CONCLUDING COMMENTS

It would be inaccurate to read SCR 2199 as having been motivated by a concern on the part of the Security Council for the fate of cultural heritage in Syria and Iraq. Clearly it was not. Statements made at the time of adoption indicate that the resolution represented part of a comprehensive strategy to “degrade and ultimately destroy” ISIS\(^237\) and its primary aim was to cut off the income streams that have enabled the group to advance its military operations and take control over territories in Syria and Iraq.\(^238\) One such source of revenue from which the group is said to be benefitting happens to be the illicit trade in antiquities.\(^239\) How much income ISIS derives from the trade remains somewhat murky.\(^240\) But even if ISIS is not benefiting significantly, the fact that all States are now required to clamp down on


\(^{238}\) Id.


\(^{240}\) U.N. Analytical Support and Sanctions Monitoring Team (Monitoring Team) established pursuant to resolution 1526 (2004), The Islamic State in Iraq and the Levant and the Al-Nusra Front for the People of the Levant: Report and Recommendations Submitted pursuant to Resolution 2170 (2014), ¶ 73, U.N. Doc. S/2014/815 (Nov. 14, 2014) [hereinafter U.N. Analytical Support Report], http://www.un.org/en/ga/search/view_doc.asp ?symbol=S/2014/815 (“Although the looting and sale of antiquities is a known risk, it is very difficult to reliably estimate the amount of money that ISIL raises through this activity, and the Monitoring Team has not received officially confirmed information pointing to a particular sale that was clearly ISIL-related.”). See also UK Minister for Europe, David Lidington, in the Debate on Destruction of Historic Sites (Syria and Iraq). 592 Parl Deb HC (6th ser.) (2015) col. 1018 (UK) (stating “Our assessment is that ISIL is generating the majority of its revenue from oil smuggling and extortion, rather than from the illicit trade in antiquities. However, it is clearly our responsibility to ensure that we use all possible measures to deny ISIL access to funds . . .”). But see comment by the Director-General of UNESCO reported in Islamic State Militants “Destroy Palmyra Statues,” BBC (July 2, 2015), http://www.bbc.co.uk/news/world-middle-east-33369701. UNESCO’s Director-General Irena Bokova told the BBC that looting was being carried out on an industrial scale and that IS militants were “using the illicit trafficking, the selling of these objects in order to finance extremism and terrorism.”
the trade is a welcome step given the scale of the damage that is being exacted on archaeological sites across Syria and Iraq.\textsuperscript{241}

The international community’s concern over the threat posed by ISIS is hardly surprising. After all, ISIS’s expansion and control over large swathes of territories stretching across both Iraq and Syria coupled with its pretensions to “state”-hood has been deeply troubling for the international community of States since, by its actions and claims, the very edifice and principles upon which the international legal order is constituted is being defied by the group. The pushback by States has taken a variety of forms including and, in particular, through narratives around claims over cultural property rights. This is demonstrated by the repetitive references to the threat posed by ISIS as one that is directed both at the national heritage of Iraq and of Syria\textsuperscript{242} as much as at the common heritage of all peoples, enabling States, other than Iraq and Syria, to assert a legitimate interest.\textsuperscript{243} For example, on September 22, 2014, in a speech at the Metropolitan Museum of Art in New York, U.S. Secretary of State John Kerry condemned the destruction of cultural property by ISIS stating,

> our heritage is literally in peril in this moment, and we believe it is imperative that we act now. We do so knowing that our leadership, the leadership of the United States, can make a difference and that the fight to protect the cultural heritage of Iraq and Syria isn’t just about shared values. It’s about protecting a shared legacy.

> “How shocking and historically shameful it would be” he insisted, “if we did nothing while the forces of chaos rob the very cradle of our civilization.”\textsuperscript{244} On the same day, half way round the world, a U.S.-led coalition of

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\item 243. John Kerry, U.S. Secretary of State, Remarks at NY Metropolitan Museum of Art: Threats to Cultural Heritage in Iraq and Syria (Sept. 22, 2014), http://www.state.gov/secretary/remarks/2014/09/231992.htm. In condemning the destruction and damage wrought by ISIS on cultural property in Syria and Iraq, Kerry further stated, “ISIS forces the people of Iraq and Syria to pay for their cultural heritage in blood. We are determined instead to help Iraqis and Syrians protect and preserve their heritage in peace. That’s our common responsibility.”
\item 244. \textit{Id.} (“We urge all parties in Iraq and Syria and the international community to respect and protect archaeological, historic, religious, and cultural sites, including museums...
States launched the first airstrikes against ISIS targets in Syria, extending the geographical reach of the military operations against the group.245

Rhetoric aside, the commitment by States to the protection of cultural property in armed conflict nonetheless remains equivocal both in practice and in law. The deliberate destruction of cultural property by ISIS is shocking but when we permit our attention to be entirely consumed by the theatrical, too often all else becomes banal. As outlined above, existing law prohibits and criminalizes the type of conduct pursued by ISIS. That such law already exists is regrettable an indication that there is nothing novel in their behavior save for the fact that the perpetrators openly and pro-actively choose to display their criminality to a global audience. Modern technologies have likewise enabled civil society, the media, researchers and States to document and collate far more information than ever before in conflict situations, including damage to and destruction of cultural property. What has been documented to date indicates that a significant proportion of the destruction and damage to Syria’s cultural heritage over the last four years has come about as a consequence of the hostilities between the different armed groups. Much of it is likely to be justified on the basis of military necessity and/or to be deemed incidental in nature. Such damage is generally treated with silence by States although there are always exceptions. For example SCR 2199 condemns the destruction of cultural property by ISIS and ANF “whether such destruction is incidental or deliberate.”246 In so doing, the resolution draws attention to the ever present risk that the very rules that allow for violence normalizes what should be the abnormal.247 In the last two decades there have been significant advances in the legal protection of cultural property in NIAC. But the measure of our commitment to the protection of cultural property in conflict will continue to fall short until such time that we collectively consider outdated the words of General Eisenhower when, just prior to the Allied offensive into Italy in May 1944, he declared:

and archives, and reaffirm that all those who destroy important cultural property must be held accountable.”

245. The military operations against ISIS in Iraq were launched in mid-June.
247. As Bernbeck reminds us, “orthodoxies can become so well established that they sediment in collective consciousness to a level of nondiscursiveness.” Reinhard Bernbeck, Heritage Politics: Learning from Mullah Omar, in CONTROLLING THE PAST, OWNING THE FUTURE: THE POLITICAL USES OF ARCHAEOLOGY IN THE MIDDLE EAST 27 (Ran Boytner, Lynn Swartz Dodd & Bradley J. Parker eds., 2010).
Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve. It is the responsibility of every commander to protect and respect these symbols whenever possible. . . . [W]here military necessity dictates, commanders may order the required action even though it involves destruction to some honored site.  

248

Until such time, it would seem that the most that we can strive for is a little less barbarity in light of the fact that cultural treasures owe their existence not only to the efforts of the great minds and talents who have created them, but also to the anonymous toil of their contemporaries. There is no document of civilization which is not at the same time a document of barbarism. And just as such a document is not free of barbarism, barbarism taints also the manner in which it was transmitted from one owner to another.  

249
